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STATUTORY ABOLITION OF THE DEFENSE OF INSANITY IN CRIMINAL CASES.

THE great lengths to which the defense of insanity has been carried in homicide cases has induced numerous legislative attempts to abolish the evil; and the fate which such legislation has met and deserves at the hands of the courts is a matter of considerable interest.

A committee of the New York State Bar Association recently reported to the association recommending that the defense of insanity in criminal cases be abolished, taking the Thaw case as a striking illustration of the disgraceful farce made of criminal trials by the allowance of the defense of insanity under the present practice. The committee says: "Has not the time come in our system of penology to relegate to the realm of the obsolete the assumption that an insane man cannot commit crime? In other words, ought we not to abolish the defense of insanity and leave as the one issue to the petit jury—Did the accused do the forbidden act? If he did not he is innocent; if he did he is guilty; and with the state of his mind at that time the jury has nothing to do. * * * If these views be sound they could be put into effect with but little change in the statute law. Replace § 20 of the Penal Code by the following words: 'Insanity or other mental deficiency shall no longer be a defense against a charge of crime; nor shall it prevent a trial of the accused unless his mental condition is such as to satisfy the court upon its own inquiry that he is unable by reason thereof to make proper preparations for his defense'."

It will be noticed that the recommendation of the committee is exactly in line with the Washington statute; going on the ground that such an insane person is a dangerous man, against whom the public has a right to protect itself, by imprisoning him for life upon proof that he did the act, or by such other term of confinement as the legislature in its wisdom shall deem best suited for the adequate protection of the public and the care for the unfortunate. Such an attempt by the legislature of the state of Washington came to naught in the recent case of *State v. Strasburg*.¹

As stated by Mr. Justice MORRIS in his opinion in that case: "No defense has been so much abused, and no feature of the administration of our criminal law has so shocked the law-loving and law-abiding citizen as that of insanity, put forward, not only as a shield to the poor unfortunate bereft of mind or reason, but more fre-

¹ (Wash.), 110 Pac. 1020, decided September 10, 1910.

quently as a cloak to hide the guilty for whose act astute and clever counsel can find neither excuse, justification, nor mitigating circumstances, either in law or in fact. It is, therefore, not strange that there should be found a legislative body seeking to destroy this evil and wipe out this scandal upon the administration of justice. While an innovation to us, such a law is neither unknown nor untried, as it has been the law of England since 1883; and while its constitutionality cannot be questioned, it being an act of Parliament, and not subject to such attack, its enforcement must have proved its value, and obtained the approval of the English people, or some way would have been found to bring about its repeal."

The statute involved in the case above mentioned was held unconstitutional on the ground that it violated the provisions of the state constitution, that "No person shall be deprived of life, liberty, or property without due process of law," and "The right of trial by jury shall remain inviolate."

The statute under consideration in that case was Laws of 1909, p. 891, § 7 (Rem. & Bal. Code § 2259), which declares that:

"It shall be no defense to a person charged with the commission of a crime, that at the time of its commission, he was unable by reason of his insanity, idiocy, or imbecility, to comprehend the nature and quality of the act committed, or to understand that it was wrong; or that he was afflicted with a morbid propensity to commit prohibited acts; nor shall any testimony or other proof thereof be admitted in evidence."

The reason for the decision, as stated in the opinion of PARKER, J., concurred in by CROW and MOUNT, JJ., was that, "Whatever the power may be in the legislature to eliminate the element of intent from criminal liability, we are of the opinion that such power cannot be exercised to the extent of preventing one accused of crime from invoking the defense of his insanity at the time of committing the act charged, and offering evidence thereof before the jury. One so accused had this right at the time of the adoption of our constitution, and we are of the opinion that the question is so inherently related to the guilt or innocence of all accused persons that it cannot be now taken away from them without violating these guarantees of the constitution. * * * May such inquiry be so limited as to exclude therefrom any fact or facts the will of the legislature may dictate? If so, then the inquiry may be narrowed by the legislative will to the ascertainment of some insignificant fact or facts by the jury, and the state still be able to successfully contend that the right of trial by jury has been preserved. This cannot be.

The right of trial by jury must mean that the accused has the right to have the jury pass upon every substantive fact going to the question of his guilt or innocence."

The reason for the decision, as stated in the opinion of RUDKIN, C. J., concurred in by GOSSE and DUNBAR, JJ., was that even if the legislature could put the idiot, the imbecile, and the insane on a footing in criminal law with those in possession of all their faculties, it appears by § 31 of the same act (Rem. & Bal. Code, § 2283) that the legislature intended nothing of the kind; but, reading the two sections together, it is manifest that the legislature did not intend to punish any who from idiocy, imbecility, or insanity were unable to comprehend the nature of their acts; but rather intended to minimize the well known evil resulting from the all too frequent interposition of the defense of insanity in homicide cases where no other defense was available, by changing the time and mode of trial of the issue of insanity; wherefore it amounted to imprisonment because of insanity without due process of law and without a right to trial of that question by a jury. The Chief Justice said: "No such charge is preferred against the accused; and, under the express provisions of another section of the act, no testimony or other proof of the mental condition of the accused shall be admitted in evidence. The court must therefore base its judgment on the appearance of the accused, or on other matters *dehors* the record. But aside from this the accused has no notice of the proceedings against him, no opportunity to offer testimony or to be heard in his defense. The court may adopt its own procedure, free from all constitutional restraints, may counsel with experts if it will, or act as its own expert if it chooses. It is almost needless to say that such a proceeding is an absolute nullity if the question of insanity be a material one."

The § 31 above referred to provides that:

"Whenever in the judgment of the court trying the same, any person convicted of a crime shall have been at the time of its commission unable by reason of his insanity, idiocy, or imbecility, to comprehend the nature and quality of his act, or to understand that it was wrong, or shall be at the time of his conviction or sentence insane or an idiot, or imbecile, such court may in its discretion direct that such person be confined for treatment in one of the state hospitals for the insane, or in the insane ward of the state penitentiary until such person shall have recovered his sanity. In determining whether any person convicted of a crime was at the time of the commission thereof unable by reason of his insanity, idiocy, or imbecility, to comprehend the nature and quality of his

act, or to understand that it was wrong, or is at the time of his conviction or sentence insane, or an idiot, or an imbecile, the court may take counsel with one or more experts in the diagnosis and treatment of insanity, idiocy, and imbecility, and make such personal or other examination of the defendant as in his judgment may be necessary to aid in the determination."

In answer to the prosecutors' contention that the modern theory of criminal justice is treatment and cure of the accused, not punishment, and that it is within the police power of the legislature to eliminate the element of intent from all crimes, all the judges above mentioned seemed agreed that the notion of treatment and cure is illusory and unsound, because a man deprived of life or liberty for a crime he has committed is punished, and the result is not changed by changing the name or the engine of destruction. As to the other argument RUDKIN, C. J., said: "True it is that, in many cases the person accused of crime does not intend to commit the particular act which constitutes the crime. Such is the case in involuntary manslaughter, the sale of adulterated food, the sale of intoxicating liquors to minors, habitual drunkards, or insane persons, adultery, incest, statutory rape, and other crimes that might be mentioned. In the case of involuntary manslaughter the accused does not intend to commit the homicide, but does intentionally or negligently commit the wrongful act which results in the homicide. The man who sells adulterated food or intoxicating liquors may not intend to sell the particular kind of food, or to the proscribed class, but he does intend to make the sale. The man who commits adultery may not have knowledge of the married state of his paramour, the man who commits incest may not have knowledge of his relationship to the other party to the crime, and the man who commits statutory rape may not know the age of his victim; but in all such cases the man is a free moral agent, the master of his own destiny, and has it within his power to determine whether the act he is about to commit is or is not a crime, or to refrain from its commission altogether. There is little analogy between such a man and the idiot, the imbecile, or the person who is insane to the degree defined by our statute. It will be conceded that the legislature has a broad discretion in defining and prescribing punishment for crime, but broad and pervading as the police power is, it is not without constitutional limitations and restraints; and we can scarcely conceive of a valid penal law which would punish a man for the commission of an act which the utmost care and circumspection on his part would not enable him to avoid."

MORRIS, J., concurred in the result, on the ground that the question of insanity is inexplicably involved in the question of guilt, and that the accused is entitled to a jury trial on it; but he suggested that the jury might be required by the legislature to state in their verdict, in cases in which insanity is made a defense, whether they found the accused did the act and whether he was then insane; in which case, he thought the judge might be authorized to pronounce such judgment as the legislature in its wisdom might determine appropriate.

FULLERTON, J., dissented from all the above opinions, holding the statute constitutional and valid.

This rather extended review of the case has been given in order the better to present and analyze the grounds for the decision, the objections that may be raised to such legislation, and to correlate the other decisions on similar legislation. It is believed that all the objections put to the statute in these opinions are included in the following: That the statute denied the right to trial by jury and deprived the defendant of liberty without due process of law, because:

1. The defense of insanity has always been available to those accused of crime, and so cannot now be taken away.
2. That confinement is punishment though called treatment.
3. That if one fact can be taken from the jury, the right of such trial may be substantially destroyed by restricting the issues by statute.
4. That the disposition to be made of the accused on a verdict of guilty is made to depend on an investigation to be made by the judge of the court, uncontrolled by any constitutional restraints, without right of the accused to be informed of the charge against him, to be heard by counsel, to produce witnesses, to be confronted with the witnesses against him, to cross-examine them, to have the investigation governed by the legal rules of evidence, or to have any other of the personal rights guaranteed by the constitution.

1. As to the defense of insanity having been always allowed, and therefore not now to be avoided without violating the constitution, the first part of the statement is simply not true; and therefore any conclusion based on this premise would probably be unsound. It was at one time thought that no man should be permitted to stultify himself by alleging his insanity, and further the plea was considered inconsistent with itself, for if he were without his mind at the time of the fact how could he know anything about it? As late as 1742 it was declared by the court in a trial in England that in order for

insanity to excuse "it must be a man that is totally deprived of his understanding and memory, and did not know what he was doing more than an infant, a brute, or a wild beast."² And even to this day, nowhere is the insanity a defense unless it induced the commission of the act or else was so related to it as to disable the accused from comprehending that the act he was doing was wrong, or at least to prevent his understanding the magnitude of his offense. Such was the rule declared in the celebrated *McNaughten Case*³ in the English House of Lords in 1843, which has been generally regarded as a leading case and followed in this country. The fact that the accused was insane at the time he did the act, and was irresistibly impelled to the act by the influence of the disease of his mind so that he could not avoid it, is even now generally regarded as no defense if he then realized that the act he was doing was wrong. As was said by Baron BRAMWELL in instructing the jury in a much quoted case in which the accused was convicted and sentenced to death: "If an influence be so powerful as to be termed irresistible, so much the more reason is there why we should not withdraw any of the safeguards tending to counteract it. * * * If the influence itself be held a legal excuse, rendering the crime punishable, you at once withdraw a most powerful restraint—that forbidding and punishing its perpetration."⁴ It is true that there has of late been a revolt against this doctrine, led by the very able and learned exposition of the question by Mr. Justice SOMERVILLE in the Supreme Court of Alabama in 1887 in the case of *Parsons v. State*,⁵ but it is still too soon to say that a revolution in the law on this subject has been effected. Enough has already been said to show the fallacy of the assumption of the judges in the case of *State v. Strasburg* that insanity is and always has been an unavoidable defense to any criminal charge. Now let us look at the next ground for the decision.

2. As to the contention that confinement is punishment though called treatment, there is no need to debate that it may be inconvenient for the person confined; but in so far as punishment is inflicted for crime it can have but two objects worthy of any government: (1) that the fear of it would deter this individual and others from doing such things; and (2) that the object lesson of giving the punishment would serve the same purpose in the future. Sure-

² Arnold's Case, 16 How. St. Trials, 695, 764, 765.

³ 10 Clark & Fin. 200.

⁴ *Regina v. Haynes*, 1 Foster & Fin. 666.

⁵ 81 Ala. 577, 2 South. 854, 60 Am. Rep. 193.

ly no government can be warranted in taking revenge for any crime. But aside from all punishment the public has a right to be protected from further injury by putting the wrong-doer where he will have no opportunity to repeat this wrong or to do others. It is on this right to protect the public that private property of innocent persons is often taken without process and destroyed. There having been harm done by the accused, of which the jury on proper trial has found him guilty, what matter is it whether the action of the government taken to prevent him from doing further wrong be called treatment or punishment?

3. That if one fact can be taken from the jury by statutory definition of the offense another may, till the right to trial by jury is substantially destroyed. In so far as the statute concerned in the case of *State v. Strasburg* attempted to restrict the issue by definition of the offense or otherwise, it did no more than eliminate the question of intention and moral guilt to say the most; for insanity as a defense in criminal cases only goes to the existence of criminal intent. And that the legislature may make the doing of the prohibited act a crime regardless of the intent with which it has been done is a proposition which has heretofore been generally admitted; and that principle or doctrine has been recognized and applied in numerous cases in the court which decided this case. Among these may be mentioned *State v. Constantine*,⁶ holding a statute constitutional which made it criminal for saloon-keepers to sell or permit the sale of intoxicating liquors to minors regardless of knowledge or intent, and sustaining a conviction on proof of a sale by defendant's bar-tender while defendant was absent from the city, though defendant did not know of the sale till his return to the city and before his departure had explicitly commanded the bar-tender not to sell to minors; *State v. Zenner*,⁷ sustaining a statute making it criminal to accept the earnings of a prostitute though without knowledge that she is such; and, *State v. Glindemann*,⁸ sustaining a statute which made incest to consist of the act of intercourse regardless of the knowledge by the parties of their relationship to each other. The cases of this sort in other courts are all to the same effect, and so numerous and varied, that it will be sufficient to say that the doctrine has received the sanction of the Supreme Court of the United States in holding that there was no denial of due process of law in a conviction of keeping a gambling house, on proof merely of possession of the paraphernalia, which the New York statute provided should be

⁶ 43 Wash. 102, 86 Pac. 384, 117 Am. St. Rep. 1043.

⁷ 35 Wash. 249, 77 Pac. 190.

⁸ 34 Wash. 221, 75 Pac. 800, 101 Am. St. Rep. 1001.

sufficient evidence of the offense.⁹ In this case the court said: "It is within the established power of the state to prescribe the evidence which is to be received in the courts of its own government." Which is as much as to say what evidence shall be competent and what shall be sufficient to convict, which is all that is provided by the statute under consideration. The court in deciding the case of *State v. Strasburg* admitted that the legislature might eliminate the element of intent in many crimes, but proceeded to draw the line on such a statute as this, saying: "Whatever the power may be in the legislature to eliminate the element of intent from criminal liability, we are of the opinion that such power cannot be exercised to the extent of preventing one accused of crime from invoking the defense of his insanity at the time of committing the act charged, and offering evidence thereof to the jury." If the case is disposed of on this ground we may not say that the decision is positively wrong, however much the public may suffer from the evil designed to be abolished by this legislation, for there may be a line that should be drawn. All we can say is that this is the first case to draw such a line here.

One point strongly urged by Chief Justice RUDKIN in *State v. Strasburg* to show why the decisions sustaining statutes which eliminate the element of intent in certain crimes do not control this case, is that in these cases there was an intent to do something, to sell drink, for example, though without knowledge that it was intoxicating, to sell to someone though without knowledge that he was an infant, to commit fornication though without knowledge that the other party was under age or married, and the like, whereas the insane person intends nothing. The distinction is based on a supposition of fact that does not exist. The defense of insanity is not based on any supposition that the insane person does not know what he is doing, but merely that he does not know it is wrong because he is laboring under a delusion which produces a mistake of fact causing the act to appear to the insane person innocent. He knows what he is doing and intends to do it; but he does not know it is wrong, and that is the reason why he is excused from liability. The attempt to make a distinction on this ground serves merely to emphasize the fact that the parallel is complete. The cases heretofore adjudged and recognized by the Supreme Court of Washington to be sound are to all intents and purposes similar to the one under consideration. Lord COKE indeed did say that no one was excused from criminal liability unless he had wholly lost his memory and

⁹ *Adams v. New York*, 192 U. S. 585, 24 Sup. Ct. 372. See also *Ford v. State*, 85 Md. 565, 37 Atl. 172, 41 L. R. A. 551, 60 Am. St. Rep. 337.

understanding; but that was long before the days when scientifically conducted asylums gave opportunity to observe the conduct of large numbers of insane persons; and COKE's notion of the insane seems not to have found any favor in the courts since it was attacked in 1800 in the trial of Hadfield by Lord ERSKINE, who declared that no such mad man ever existed in the world; to which Lord KENYON replied by ordering a verdict of acquittal, and declared with emphasis that there was no doubt on earth that ERSKINE was right.

4. As to the fourth ground for the decision in the case of *State v. Strasburg*, that the disposition to be made of the accused when he is found guilty under this statute by the verdict of the jury, is made to depend on an investigation to be made by the judge of the court uncontrolled by any constitutional restraints, and therefore is without due process of law, and is a denial of right to trial by jury. It is believed that the gist of this contention is that one convicted of crime is still entitled to his day in court and to be heard as to the judgment to be pronounced against him. If such is its meaning it is certainly a new and startling doctrine. If such is not its meaning, it is merely a re-iteration of the contention that a statutory elimination of the defense of insanity as bearing on the criminal intent, or the total elimination of the element of intent in *homicide* cases is an unconstitutional denial of due process of law, though the element of intent may be wholly eliminated by statute in other classes of cases. Is the convict entitled to be heard as to the sentence that shall be pronounced against him? The custom is general if not universal and as old as the law, for the court, on asking the convict to stand and hear his sentence, to ask him whether he has anything further to say why judgment of the law should not be pronounced against him, and this is a common point for counsel to move in arrest of judgment on any ground that they think available; perhaps it might be granted that the convict is entitled to be heard through the arguments of counsel; but the contention in this case is that he is entitled to have another jury empanelled at this point, to produce other witnesses, and proceed to a new trial. It is believed that no such practice has ever existed, to say nothing of the convict being entitled to it. It often happens that there are several state institutions to which the judge may sentence the convict for confinement, and what matter is it that one is called a hospital and the other a penitentiary? Does that fact entitle the accused to be further heard? Again, the court usually has a wide discretion as to the length of the sentence to be given or the amount of the fine to be imposed. Does that fact entitle the convict to be further heard as to the propriety of the proposed sentence? The court may confer with counsel or

not, make such extra-judicial investigation as he pleases unhampered by any constitutional limitations, or pronounce sentence without making any further investigations at all, just as he pleases; such is believed to be the general practice. When it was contended before the Supreme Court of the United States that denial of the right to be heard in court, to produce evidence, and have a jury trial on the suggestion of insanity arising after verdict was a denial of due process of law that court said: "Without analysis of the contention it might well suffice to demonstrate its obvious unsoundness by pointing out the absurd conclusion which would result from its establishment. If it were true that at common law a suggestion of insanity after sentence created on the part of a convict an absolute right to a trial of this issue by a judge and jury, then, (as a finding that insanity did not exist at one time would not be a thing adjudged as to its non-existence at another) it would be wholly at the will of a convict to suffer any punishment whatever; for the necessity of his doing so would depend solely upon his fecundity in making suggestion after suggestion of insanity, to be followed by trial upon trial."¹⁰

It is undoubtedly true that any statute that provides for an inquisition of sanity as a basis of confinement of anyone who has committed no offense or been convicted of none, would be void as a denial of due process of law unless the supposed insane person were to be given notice and an opportunity to be heard,¹¹ but from the fact that one cannot be confined on an inquisition of sanity unless he has been given an opportunity to be heard, it does not follow that a court in sentencing one who has been convicted of crime by a jury trial may not consider his mental condition in fixing the sentence without giving him notice and opportunity to be heard on it.

In conclusion notice may be taken of such decisions as are found on other statutes for like purposes. Some forty years ago the legislature of Michigan provided that one acquitted of a charge of felony on the ground of insanity should lie in the state hospital for the insane till released on inspection by order of the prison inspectors; and later by statute in North Carolina it was provided that persons similarly acquitted should be similarly confined till ordered released by act of the general assembly of the state. Both of these statutes were held unconstitutional on the ground that they denied due process of law. On these statutes it was well said that on a verdict of acquittal of any crime, there was no ground for further

¹⁰ Nobles v. Georgia, 168 U. S. 398, 18 Sup. Ct. 87.

¹¹ *In re Lambert*, 134 Cal. 626, 66 Pac. 851, 55 L. R. A. 856, 86 Am. St. Rep. 296; *Hunt v. Searcy*, 167 Mo. 158, 67 S. W. 206; *State ex rel. Blaisdell v. Billings*, 55 Minn. 467, 57 N. W. 206, 794, 43 Am. St. Rep. 524.

detention unless on the ground of insanity; and to permit the accused after establishing his innocence to be confined when no criminal charge stood against him, without permitting him any hearing on the cause of his detention till a proceeding should be put in motion by someone else who had no interest in moving in the premises, was depriving him of liberty without due process of law.¹² Certainly continuing the confinement of one accused after he has been acquitted of any criminality by the judgment of his peers and denying him any right to be heard on the cause of his confinement, is not to be confused with denying a convict a hearing and trial as to the nature of the sentence which shall be pronounced upon him. And yet under a statute much like those last above mentioned the Supreme Court of the State of Washington, the very court that decided the case of *State v. Strasburg*, sustained the validity of the statute and distinguished the cases above mentioned, on the ground that under the Washington statute the person acquitted on the ground of insanity was by implication given the right to move the matter before the judge at any time. In that case the trial court, after an acquittal on the ground of insanity, entered an order directing the defendant to be confined in the hospital for insane *till further order of the court*. This order was sustained by the Supreme Court.¹³ Later the circuit court of the United States for the western district of Washington ordered the defendant released on petition for habeas corpus, on the ground that he was confined without due process of law, intimating that the statute was constitutional if construed to mean that on acquittal on the ground of insanity the accused might be detained for trial of his sanity at that time, but that his detention without giving him such trial was unwarranted.¹⁴ The circuit court said: "It would certainly be unwise to discharge from legal restraint a person acquitted of a criminal charge by reason of insanity, if, in the opinion of the court in which the case was tried, the defendant, by reason of insanity, will probably be a menace to the peace and safety of the community. The court in which such a trial has been concluded is the appropriate tribunal to assume the responsibility of dealing with the defendant in a manner to protect the community from such mischievous conduct as may be expected to follow his release from restraint. The court, however, in the exercise of the power and discretion conferred by this statute must dispose of the

¹² *Underwood v. People*, 32 Mich. 1, 20 Am. Rep. 633; *In re Boyett*, 136 N. C. 415, 48 S. E. 789.

¹³ *Ex parte Brown*, 39 Wash. 160, 81 Pac. 552, 1 L. R. A. (N. S.) 540, 109 Am. St. Rep. 868.

¹⁴ *Brown v. Urquhart*, 139 Fed. 846.

defendant upon due consideration of the facts and conditions existing subsequent to the time of acquittal, and, instead of punishing him by imprisonment for the injurious acts constituting the basis of the criminal charge of which he has been acquitted, must find sufficient ground for committing him to prison in a then manifest necessity to restrain him in order to protect the community; and the conclusion of the court should be arrived at by means of orderly proceedings, and as a result of a judicial hearing, in which the defendant shall have a full opportunity to submit a legal defense if he has one."

If this contention be sound there is no way apparent of escaping the abuse of the defense of insanity; for the more subterfuge there is in that defense, the more certain will the release of the culprit be when his sanity at the time of the inquest is investigated; and is it possible that a public which has already suffered one severe loss as a result of this real or supposed disease of the accused is bound to assume all the risk of its recurrence? Is there no way of shifting the burden or part of it onto the one who caused the injury? It is believed that there is and that the way is pointed out by the statute held unconstitutional in *State v. Strasburg*. No valid objection to the statute has yet been suggested. Upon appeal to the Supreme Court of the United States from the decision of the United States circuit court for the western district of Washington which was referred to and quoted from above, the order of the federal court appealed from was reversed and the commitment by the order of the state court allowed to stand even under the old statute.¹⁵ It is probably true that the last statute enacted was provoked by the decision of the United States circuit court; and perhaps the decision in the case of *State v. Strasburg* was influenced by the fact that the Supreme Court of the United States had sanctioned the prior statute. Nevertheless, it is believed that the last statute is sound and constitutional and should have been sustained.

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¹⁵ Urquhart v. Brown, 205 U. S. 179, 51 L. Ed. 760, 27 Sup. Ct. 459.